prepared by some one on his behalf. Nor am I inclined to sacrifice justice in favour of a technicality. But I think it dangerous to sustain a conviction for contravening a condition unspecified in the charge, a condition not produced in the Court below, and on the evidence of two Police Officers who simply testify to the passing by of the vehicle containing eight persons. It may be that those persons continued on to Pertang, the prosecution witnesses do not even say the accused was in the lorry, much less that he was the driver.

For these reasons and in particular the non-production of the permit in the Court below, the appeal succeeds.

But I wish to go further, and for this purpose I shall assume the relevant permit had been tendered and admitted in the Court below. I am satisfied that in such cases the prosecution may proceed against the owner or the driver. I consider the charge in this case should have read :—

> That you at.....hours on the 26th day of August, 1947, at Pertang, being the driver of motor vehicle No. N 1937 operating under Motor Vehicle Haulage Permit No. 6406, did carry.....passengers contrary to special condition 1 of the said permit, thereby committing an offence punishable by regulation 6 of the Motor Vehicles Commercial Use Regulations.

Now either the driver or the owner or both may be proceeded against. I think the charge would have to be against the driver for "using" *Gifford v. Whittaker*[1], *Dris bin Taib v. Public Prosecutor*[4], while if against the owner for "causing" or "permitting" *Low Ah Seng v. Public Prosecutor*[2], and *Lee Lai Fong v. Public Prosecutor*[3].

Ground of appeal (e) discloses a misapprehension of the law. It reads :—

> (e) That the learned Magistrate was wrong in holding that a breach of the conditions of the Permit had been committed. The condition of the Permit authorising the operation of the said lorry, approves — besides the driver and attendant, the conveyance of the owners (or their employees) of the goods which are being conveyed thereon. A copy of the Permit is annexed hereto marked 'A'.

By special condition 5 the permit is *personal* to the owner in whose name it is issued; it is not transferrable; therefore should he hire or charter his vehicle to another he cannot pass the sanctions in the non-transferrable permit personal to himself. If the hirer wishes to carry employee-passengers, in accordance with special condition 1, he must obtain a separate permit. Indeed, reading carefully the permit it seems that the permit holder must be the driver. Condition 6 allows an attendant, but nowhere is there provision for a driver other than the permit holder.

Grounds (b), (c) and (d) concern findings of fact. The Magistrate believed the prosecution evidence that the lorry carried eight persons when passing Kuala Klawang, and I see no reason to disturb this. I mention this to emphasise that the appellant has in no way succeeded on the grounds of appeal filed by him. It is on the non-production of the permit that the appeal is allowed.

Conviction Quashed.

PEK TIN SHU & ANOTHER v. PUBLIC PROSECUTOR.

[App. Cr. Juris. (Evans, J.) April 28, 1948]
[Perak — Cr. App. No. 17 of 1948]

Societies Ordinance No. 11 of 1947, s. 13 — Assisting in the management of an unlawful society — Form of Charge — Criminal Procedure Code, Ss. 152, 153, 154, 421 and 422.

In this case the Appellants were charged as follows:—

> "That you between the middle of 1946 and 14.1.48 in Teluk Anson, assisted in the management of an unlawful society, to wit, TRIAD SOCIETY, and thereby you have committed an offence punishable under Section 13 Ordinance No. 11/47."

The appellants were represented by Counsel in the Court below and did not object to the form of the charge. The District Judge in convicting the appellants recommended that the appellants be banished.

In quashing the conviction Evans, J. held:

(1) That when a charge, as a charge, is useless and where the accused, though he did not object to the form of the charge even though he was represented by Counsel, must have been seriously embarrased and where it is manifest on the record that the Court was misled, then the conviction and sentence cannot stand.

(2) That a District Judge has no power to recommend in his Judgment that a prisoner be banished and such a course is quite improper.*

Cases referred to :—

(1) *Rex v. Edwards* (1913) 1 K.B. 287.

(2) *Rex v. Johnson* (1945) K.B. 424.

MAGISTRATE'S APPEAL.

Evans, J. : — In this case the two appellants were found guilty of an offence which is set out in the charge as :—

> "That you between the middle of 1946 and 14.1.48 in Teluk Anson, assisted in the management of an unlawful society, to wit, TRIAD SOCIETY, and thereby you have committed an offence punishable under Section 13 Ordinance No. 11/47."

They were charged together with another man, who was also found guilty but who has not appealed,

* It is respectfully submitted that it does not appear that there is anything objectionable in usual practice of recommending that consideration be given to the institution of banishment proceedings. *Ed. M.L.J.*

and against whom evidence was given of possession of a large number of documents produced. The possession of those documents was not connected with the appellants except that the first appellant's name appears in P. 5, an account book. The first accused in giving evidence on his own behalf further asserted that the first appellant here is a collector on behalf of "the Brothers". Apart from this, the evidence against the two appellants consists of statements by persons admitting that they are members of the *Ang Bin Hoay* as to the appellants' presence on different occasions at certain meetings.

The first witness referred to a meeting ten miles along Changkat Jong Road, to the East of Teluk Anson, on the 4th day of the 9th Moon 1946.

The second referred to a meeting at the 23rd mile Bagan Datoh Road, meaning 23 miles from Teluk Anson to the West, on 3rd November, 1946, although it seems the same witness had previously stated that he only joined in early 1947.

The next referred to a meeting vaguely described as in the jungle, without any indication of the distance from Teluk Anson or anywhere else, on the 12th April of a year unspecified.

The next gave evidence of a meeting 13 or 14 miles from Teluk Anson at Changkat Jong on the 18th December, 1946.

The next gave evidence of a meeting at the 16th or 17th mile Bagan Datoh Road on a day unspecified.

The next was inconclusive.

The next speaks of a meeting at a place described merely as the Bagan Datoh Road, again on a date not specified.

The second appellant was not seen at all these meetings. It would appear impossible to say, on the evidence as taken, that any two witnesses refer to the same meeting.

Mr. Mahendran, who appeared for the first appellant, objected to the conviction on three grounds. He objected, in the first place, that the charge was lacking in particularity as to the time and place of the offence. Objections as to pleadings are sometimes looked on with disfavour as being founded on technicalities. Pleadings are, however, essential to judicial proceedings and are necessary to clarify the issue and to inform the Court of what is to be proved. There is no distinction in origin and purpose between pleadings in civil and in criminal cases. Such distinctions as there are are purely temporary and accidental. In the case of criminal proceedings, the pleading serves the additional purpose of giving the accused person due notice of what the offence is with which he is charged and what acts are to be proved against him. The rules governing pleading may differ from time to time, but the purposes remain the same and should be borne in mind.

Mr. Mahendran referred to Section 152 (i) of the Criminal Procedure Code, which states that "Every charge under this Code shall state the offence with which the accused is charged", and goes on to state in sub-section (ii) "If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only". He went on to refer to Section 153 (i) which provides "The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged". Mr. Neal, in reply, referred to Sections 421 and 422.

At the time these sections were passed the old rules as to drafting an indictment still prevailed. They were regarded as unduly cumbersome and technical. Under them the facts were set out in detail and in the case of a misdemeanour no 'name' at all was attached, but the indictment went on simply, after setting out the facts, to the formal ending. It is, therefore, a curious anomaly that while civil procedure passed from categories of causes of action to a plain statement of facts on which the plaintiff relies, criminal pleading has in fact taken the opposite course. In simplifying the pleading in in England, the 1915 Act requires the pleader to set out a statement of offence and particulars of offence. Section 152 would seem to do little more than to call for a statement of offence and the accused person is apparently presumed to know what acts the law connotes by the technical term, or "specific name" used in the charge. Section 153 limits the particulars to a few matters. In the majority of cases a crime consists of a single act which can be defined by time and place and each act should be the subject of a separate charge. Under Section 164 not more than three such acts can be joined in one set of charges. In addition to the sections referred by Mr. Mahendran, however, there is Section 154 which lays down: "When the nature of the case is such that the particulars mentioned in the last two preceding sections do not give the accused sufficient notice of the matter with which he is charged the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose".

In this case it will be observed that evidence was given of acts scattered over a great part of Lower Perak, from 14 miles on one side of Teluk Anson to 23 miles on the other, possibly a distance of 37 miles, and on six different occasions. The prosecution might, therefore, be giving evidence of six different offences on this single charge. The offence charged is defined in Section 13 of the Societies Ordinance, 1947, which reads: "Any person managing or assisting in the management of an unlawful society shall be liable to imprisonment for a term which may extend to three years". The act charged, therefore, is "assisting in the management", and it would seem that that act is a continuing act or course of conduct, and the specific acts deposed to are merely evidence of that course of conduct although it would seem that each one might be the subject of a charge. In the illustrations under Sections 154 there is none which deals with what might be described as a continuous act. They deal, however, with certain offences which describe the nature of the act rather than the act itself, such as cheating, disobeying the direction of the law, in each of which cases, however, particulars must be given. In the scheduled charges there does not seem to be one which deals with a continuous act and they therefore throw no light on this matter. The act is, however, of a similar kind to those of keeping a disorderly house, keeping a gaming house, or causing a public nuisance by carrying on an offensive trade. In each of these cases, however, there is always certainty as to the place. According to the English forms, the offence is usually charged as being committed on a specified day and on other days between that day and any specified day. It seems clearly to indicate that evidence will be given of an act of keeping or carrying on on the first day specified and on the last, and an indication that similar acts might be proved between these times but always in respect of the same premises.

Even making allowances for the fact that the offence charged is a continuing act, the charges last referred to are far removed from the charge in this case, which gives a commencing date no more specific than "the middle of 1946" and a concluding date "the 14th January, 1948", the date upon which the first accused was arrested and the exhibits found, matters of little interest to these two appellants. In those cases a definite place is always named and the act alleged in respect of that place. It is not unreasonable to expect a man to know the extent of his actions in respect of a definite place. In fact, the accused persons seem to have been expected to defend themselves in respect of any act which might be interpreted as assisting in the management of a society on one of over 500 days at any place, possibly vaguely described as in the jungle, within a radius of 25 miles from Teluk Anson.

Mr. Mahendran's second objection was that the conviction of his client (and this applies in fact to both accused) depend upon the evidence of accomplices. The witnesses, whose evidence I have been considering, are all members of this illegal society, but as the Federal Counsel has pointed out they are not therefore, strictly speaking, accomplices. There is nothing in their evidence, or in anything known about them, that renders them liable to the charge brought against the appellants. Suspicion of accomplices' evidence is of long standing, and although it has arisen at different times for different reasons some of the objections thereto would apply to these witnesses, and it would certainly be wise to scrutinise carefully their evidence before accepting it.

The learned District Judge, in the course of his judgment, refers repeatedly to the witnesses being frightened. In cases such as these, the vengeance of their fellow members cannot, of course, be overlooked as a cause of fear. There are, however, many reasons why a witness giving evidence, true or false, may be frightened, and the learned District Judge expresses no opinion as to the cause of these men's fear. But he does attribute thereto the fact that they are unable to give detailed information. This inability again may well be due to other causes, and is all the more unfortunate when the evidence goes to isolated acts.

The learned District Judge then goes on "The testimony of the witnesses for the prosecution six to twelve sums up to this: that on at least two occasions triad initiation ceremonies were held in secluded spots in the jungle. On those occasions the witnesses were initiated. *At both* those ceremonies the three accused acted as sponsors and gave the witnesses the impression that they were officials". Again, in setting out his findings, he states: "That all three accused were present at two triad initiation ceremonies one in the jungle on the Changkat Jong Road and one in the jungle on the Bagan Datoh Road". As has been pointed out, even where dates and places are given for these meetings, they conclusively shew, if true, that each witness is speaking to a different meeting. The remaining witnesses are so vague that it is quite impossible to say that they are corroborating one or the other. It is, therefore, abundantly clear that the learned District Judge was not even aware of how many overt acts the prosecution were attempting to prove and certainly was not in a position to say how

many they have proved. For these reasons, it seems to me abundantly clear that the charge wholly fails in its object as pleading, and I certainly do not think it complies with Section 154 of the Criminal Procedure Code. The offence defined is as vague as treason. When the words of the law constituting an offence are a mere description of an act by reference to its purpose or tendency, leaving it open to the prosecution to allege almost innumerable acts done with such purpose (in this case as acts of assisting or as acts tending to prove assisting), and are not definition of an act, then in order to shew the manner in which the offence was committed, it seems to me the prosecution must set out the overt acts they intend to prove. The Federal Counsel argued that the appellants were represented by Counsel in the Court below and did not object to the form of the charge. It is certainly no part of the prisoner's duty to perfect the charge for the prosecution, nor is it clear at what point he suggests the charge became embarrassing and this objection should have been taken. Had the prosecution only sought to prove one overt act the charge might not have been so faulty. The different statements of the witnesses might have been treated as contradictions of one another. One is left in the dark as to whether these witnesses are making conflicting statements as to one event or independent statements as to separate events. I do not think there is anything in counsel's point. Defects in an indictment which might have been objected to have been successfully made grounds of appeal.

The Federal Counsel also referred to Section 421 and 422 of the Criminal Procedure Code. Although the charge, as a charge, is useless, I cannot say there is no charge under Section 421. The powers conferred on the Courts under Section 422 have frequently been considered. It seems to me that the defence, whether it objected or not, must have been seriously embarrassed and it is manifest on the record that the learned District Judge was misled. Many appeals have been allowed in England on the ground of duplicity in the indictment. Although, as has been pointed out, this charge seems to relate to possibly six separate acts, I do not think that ground can be urged against this charge as the offence charged seems to be a continuous one. In other cases of objection to the form of the charge, these powers have generally, if not always, been used. Where, however, the defect is not purely formal but may affect the merits of the charge, an objection based on such a defect has been made the ground for allowing an appeal, *Rex v. Edwards*[1], *Rex v. Johnson*[2].

Mr. Mahendran objected that the evidence of these accomplices was not corroborated. There is no substantial corroboration, but even were they accomplices, this would not prevent the learned District Judge from convicting on their evidence. Mr. Mahendran does not base his argument on the provisions of the local law, to be found in Sections 114(b) and 133 of the Evidence Enactment, and implicity admits that these would enable the learned District Judge in a proper case to act on such evidence. He relies on the English practice, and the English practice is that of a Judge conducting a trial with a jury, and the rule to which he refers is that the Judge should warn the jury against convicting on the uncorroborated evidence of an accomplice. The meaning and extent of that rule can be seen from the consequences. If the Judge does so warn the jury, and the jury convicts, the convictions cannot be attacked whether there was corroborating evidence or not. Where, on the other hand, he fails to direct them the Appeal Court does not automatically quash the conviction, which would be the consequence, were it a matter of a positive rule of law and not a mere rule of practice, but examines the evidence, and if there be corroborative evidence they will, in most cases, let the conviction stand. In this case, it is clear, that danger was present in the learned District Judge's mind and he took proper precautions subject to the state in which the case was put to him to satisfy himself on this point.

Mr. Mahendran also objected to an alleged sentence recommending the prisoner for banishment. He states that such a recommendation formed part of the oral judgment. It is, of course, quite improper. The District Judge has no such powers. There is, however, no record of any such sentence and I cannot, therefore, deal with the matter as if there were.

As I think the defence was embarrassed and the Court misled by the defective charge, the conviction and sentence cannot stand. I have had occasion to point out before, the Criminal Procedure Code does not enable me to go behind the conviction and quash the charge. A re-trial is, therefore, useless. The accused are acquitted and discharged.

Conviction Quashed.

SAW SHONG HAI v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., M.U., Murray-Aynsley, C.J., S'pore, Bostock Hill, J.) Sept. 24, 1947]
[K.L. — Cr. App. No. 106 of 1947]

Penal Code, S. 302 — Summing up — Evidence in favour of the accused should be put to the assessors — Misdirection.